
No. 15,111

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

DICK E. STEARNS and THE D. E. STEARNS
COMPANY, a partnership composed of
DICK E. STEARNS and ELLEN BELSON STEARNS,
Appellants-Appellees,

v.

TINKER & RASOR, a corporation,
JOHN P. RASOR and LEO H. TINKER,
Appellants-Appellees

**PLAINTIFFS-APPELLANTS' REPLY TO BRIEF
OF TINKER & RASOR, JOHN P. RASOR
AND LEO H. TINKER IN ANSWER TO
PLAINTIFFS' OPENING BRIEF**

H. CALVIN WHITE
611 Wilshire Blvd.
Los Angeles 17, California

JAMES B. SIMMS
BROWNING, SIMMS & HYER
3303 Montrose Blvd.
Houston 6, Texas

*Attorneys for Dick E. Stearns
and The D. E. Stearns Company*

FILED

OCT 24 1956

PAUL P. O'BRIEN, CLERK

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I. SUMMARY

If one strips from defendants' brief all names and characterizations which the brief concludes should be applied to the various aspects of plaintiffs' case and looks behind the numerous approaches to the same issues, it develops that the actual issues contested in defendants' brief are few and simple. They are:

- (A) Does the doctrine of file wrapper estoppel require implying wheels or rollers into claim 1 when it does not recite them?
- (B) Is claim 1 infringed by defendants' structure, which structure complies precisely with all the requirements of claim 1 when read in their normal and natural meaning?
- (C) Is claim 7 infringed upon the basis of equivalency by defendants' structure, which admittedly complies with all structural requirements of the claim and functions in an equivalent manner to that recited in the claim?
- (D) Are plaintiffs guilty of misuse of their patent by their method of doing business in that they lease complete unitary machines embodying the patented invention and do not offer such machines nor their individual parts for sale, and in that they license others to make, use and sell what defendants contend is the patented combination?

II. THE DOCTRINE OF FILE WRAPPER ESTOPPEL

The doctrine of file wrapper estoppel does not restrict the language of a claim more narrowly than its normal meaning, particularly in the absence of prior art requiring such restriction. Plaintiffs do not contend that there is no file wrapper estoppel to be considered in connection with claim 1. However, this file wrapper only restricts the claim to the normal meaning of the words added by amendment and not to wheels.

Smith v. Snow, (1935) 294 U.S. 1, 14-16; 79 L. Ed. 721, 730;

National Hollow Brake Beam Co. v. Interchangeable B. B. Co., (C.A. 1901), 106 F. 693, 714;

Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co., (C.A. 8, 1909), 168 F. 271, 278;

New York Scaffolding Co. v. Whitney, (C.A. 8 1915), 224 F. 452, 462.

The cited cases set at rest the limits which should be imposed on the doctrine of file wrapper estoppel. In the *National Hollow Brake Beam* case, which was the basis for the Supreme Court's decision in the *Smith v. Snow* case, the Eighth Circuit Court of Appeals said:

" * * * It is true that if a patentee acquiesces in the rejection of his claim on references cited in the patent office, and accepts a patent on an amended claim, he is thereby estopped from maintaining that the amended claim covers the combinations shown in the references, and from claiming that it has the breadth of the claim that was rejected (citing cases). But this is the limit of the estoppel. One who acquiesces in the rejection of his claim because it is said to be anticipated by other patents or references is not thereby estopped from claiming and securing by an amended claim every known and useful improvement which he has invented that is not disclosed by those references. The only limitation * * * was that he was thereby estopped from maintaining that it covered the devices disclosed in the references cited by the examiner, which the latter believed were within the limits of the claim first presented. * * * The proceedings in the patent office, therefore, have not so restricted the scope of this patent that the appellee can appropriate the principle and the combination it discloses and secures, and then escape liability by an immaterial change in the form of one of its elements."

The last clause of claim 1 is written below in its original form with the amendments added by interlineation to illustrate the history of the claim:

1. * * * and means rotatably engaging and forming a movable electrical contact with said spring at a position remote from the surface of said member for connecting said spring to a high voltage testing circuit and for rolling said spring along such elongated member.

Thus, it is seen that "means" was modified by the insertion of the amendatory matter "rotatably engaging and * * * and for rolling said spring along such elongated member." These words, when given their ordinary meaning or connotation are not restricted to wheels, and this is consonant with the remarks which accompanied the amendment.

III. DEFENDANTS' CHARACTERIZATIONS OF PLAINTIFFS' CHARGE OF INFRINGEMENT AND THEIR BUSINESS PRACTICES ARE REFUTED BY:

- (A) The Trial Court's analysis of Defendants' machine as a copy of Plaintiffs';
- (B) The facts — as distinguished from Defendants' characterizations in Defendants' brief; and
- (C) The integrated character of Plaintiffs' holiday detector.

Defendants, in their brief, employ strong language in an attempt to belittle plaintiffs' charge of infringement and to brand plaintiffs' business practices as monopolistic. The

facts of the case and the *facts* set out in defendants' brief, as distinguished from their characterizations, just do not support these charges.¹

1. THE ISSUE OF INFRINGEMENT

The concluding section of defendants' brief relating to infringement states:

"Unless this Court puts a stop to it, plaintiffs will toss out all the rules of claim interpretation and will sue and harass every firm and person who rolls a spring on a pipe, regardless of the means of doing it. Plaintiffs will have a monopoly as a result."

These are strong words. Truly, the Court should examine the acts of the plaintiffs which occasioned such expressions. They are refuted by the close similarity of the holiday detector of defendants and that shown in the Stearns patent and plaintiffs' machine and by the trial court's characterization of defendants' detector as "fundamentally a copy".

¹ Defendants characterized plaintiffs' charge of infringement and their business practices as "absurd"; "fantastically broad"; "deliberately ignore express limitations"; to construe the claims to "cover everything that will accomplish the same result"; as suggesting as a "criterion of infringement * * * something other than the claims"; as "seeking to stretch the scope of their patents beyond reasonable limits"; as relying on "general, ambiguous language" in the patent specification; as covering something called "abortive", which Stearns allegedly found "unsatisfactory" and "discarded"; as being "exaggerated fantastic construction"; as being "completely at variance with the facts"; as doing "violence to common sense"; as being a "fantastically broad interpretation"; as involving the "strange position" that wheels or rollers are "bother", "expense" and "trouble", rather than a necessity; as showing an intent by plaintiffs "to terrorize competitors"; as "overclaiming" and "functional claiming at its worst"; and as covering "a wholly new concept * * * in which the spring is no longer supported by the pipe".

(See quotation from Record, page 40 of plaintiffs' brief). Further, a careful examination of defendants' 49-page brief reveals that the only acts of plaintiffs giving rise to the above expressions are as follows:

- (a) *Plaintiffs seek a construction of claim 1 only in accordance with the ordinary meaning of its language*

As to infringement of claim 1, plaintiffs urge only that the means "rotatably engaging and - - - and for rolling said spring along such elongated member" be construed in accordance with their plain ordinary meaning to cover and be limited to a means which engages the electrode in such manner as to permit the electrode to rotate with respect to the means as it is rolled along the pipe. This plain ordinary interpretation includes the wand (P. Ex. 26-A) of defendants' structure. This claim is limited by its terms and by file wrapper estoppel to a rotatably engagement, and plaintiffs neither ignore nor seek to avoid this. Instead, plaintiffs seek exactly that construction of these words which the attorney's remarks at the time of their insertion clearly show was then intended.

Plaintiffs do object to reading into this claim, *by implication*, a further limitation that the means must have wheels or rollers, when the claim does not and never did include such limitation. Plaintiffs urge further that, where this very claim was in the application from the time the application was filed, without at any time specifying wheels or rollers, it is conclusive that the patentee did not consider his invention was limited to wheels or rollers and that there is nothing ambiguous about this language. The circumstance that the inventor Stearns first established the fact that the spring could be rolled by testing its rolling characteristics with a crude block model having no wheels or

rollers further confirms the reason for the inclusion of the broad language in the claim. After establishing the fact that the spring could be rolled by a "means rotatably engaging" the electrode, Stearns then went on to perfect what he considered to be the preferred embodiment shown in the patent drawings. His perfection of his invention does not detract from the broader aspects, nor does it constitute an abandonment of the less desirable stationary bearing-type pusher or change the literal meaning of the words "means rotatably engaging."

(b) *Plaintiffs contend claim 7 infringed by structure which admittedly includes all structure of claim and equivalent function*

As to infringement of claim 7, plaintiffs urge that defendants' device (P. Ex. 26, -A, -B and -C) which admittedly complies with the structural requirements of the claim, should not be ruled not to infringe merely because the connection between the carriage and the pusher is so flexible as to permit relative movement between them and require, for operation, that the operator hold to both the carriage and the wand instead of just the carriage. Plaintiffs urge that even though the invention of the claim is practiced imperfectly, its substance has been taken. Plaintiffs object to the action of the lower court in reading into this claim the limitation, which is not expressed, that the pusher "be a solid, rigid, immovable structure mechanically carried by and movable with the carriage." (F. of F. No. 7, R., 925)

2. THE CHARGE OF FUNCTIONALITY

The claims are charged with being functional, and this is coupled with the charge that plaintiffs' counsel, Mr.

Simms, upon questioning by the court, has urged that the claims are functional and cover any device in which a spring is rolled.

This exchange between court and counsel, when read in context, is seen to refer only to the single element of the claim that is defined in the means clause (R. 1000-1001). The claim of course has other structural recitations which limit the claim. The claim covers not merely one element but a combination of elements, only one of which is recited functionally, as permitted by statute, 35 U.S.C. 112. Plaintiffs seek only the natural and normal meaning of the claim language without either implied limitation or broadening.

Mr. Simms' statement to the trial court, as quoted at page 26 of defendants' brief, pointed out that it is necessary that the *means* "operate in the same way, do substantially the same thing, and give the same results." This is the time-tested rule for testing equivalency, and the statute, 35 U.S.C. 112, states that means clauses in claims are to be construed as covering what is shown in the patent and "equivalents thereof." Thus, Mr. Simms' statement has the sanction of statute, although characterized by defendants as "functional claiming at its worst."

3. THE CHARGE THAT THE CLAIMS ARE BEING TREATED AS A "NOSE OF WAX"

The defendants express alarm concerning the treatment of the Stearns patent claims like a "nose of wax." However, it is the defendants and the lower court that have twisted the words of the claims by implying limitations. Plaintiffs seek to have the words of the claims given precisely the interpretation which they are normally given. It is the defendants and the lower court who would *imply*

limitation of the claims to wheels and rollers in claim 1 and "a solid, rigid, immovable structure" in claim 7. No one should be "terrorized" by this except one who has appropriated the claimed invention and anticipates just retribution.

This case is similar in this regard to that before the Fifth Circuit recently in *Tubular Service v. Sun Oil Company*, 220 F. 2d 27; *cert. den.* 349 U.S. 947. In that case the defendants, as here, sought to have the patent claims read as limited to elements not recited in the claims. In the Fifth Circuit case, defendants sought an interpretation of including a centering device and specific "feeler spring" strengths on the theory that the disclosure in the patent described only one embodiment having these things and did not say that they could be omitted. The Fifth Circuit, after concluding the patented device would operate without them and had been claimed without them, stated that it saw no reason to so limit the claims where the patentee "by omitting any express reference thereto in claiming its monopoly undoubtedly sought to avoid" the imposition of such limitations and restrictions on its patent.

The Stearns patented device will operate without wheels or rollers on the pusher as is conclusively shown by defendants' devices, which admittedly meet the exact terms of claim 1. There is no contention by anyone that defendants' devices don't operate.

4. THE ISSUE OF MISUSE

(a) *The facts*

Plaintiffs, who have what they contend is a patent on a holiday detector characterized by specified electrode and pusher arrangements, lease complete detectors which in-

clude the patented invention. However, defendants contend that the patent is on an electrode, pusher and carriage combination. Plaintiffs do not sell holiday detectors, complete or otherwise, nor do they sell or lease detector parts as such. There is no evidence that plaintiffs have ever been requested to lease or sell the electrode-pusher-carriage combination alone. However, they do offer and have granted licenses on the basis of a flat royalty of \$250 for a paid-up license for the use of one electrode and pusher combination for the life of the patent. The licenses grant the permission to renew or replace the parts of the combination as many times as desired without additional royalties. Such licenses have been granted both to users and to sellers.

Defendants contend that because plaintiffs' patent claims recite only the electrode, pusher and carriage, plaintiffs must sell these elements without any of the "unpatented" parts. However, Stearns' high-voltage electric unit is a specially designed integrated part of the carriage, indivisible in any ordinary or practical sense, and there is no evidence that anybody makes or would make such a unit to fit Stearns' carriage, even if the carriage were sold separately. Actually, the electric parts are individually mounted on the carriage parts which provide the chassis. The high-voltage unit is not separately manufactured as a unit for mere insertion in the carriage. The end result is an integrated machine. This is shown by the clear plastic model of plaintiffs' machine which is in evidence (P. Ex. 17).

(b) *Legal argument*

Thus, the facts pertaining to plaintiffs' business practices are on all-fours with the recent decisions of the Second and Sixth Circuits which specifically turned down charges of

misuse in *Electric Pipeline, Inc. v. Fluid Systems, Inc.* (CA 2, 1956), 231 F. 2d 370, and *Great Lakes Equipment Co. v. Fluid Systems, Inc.* (CA 6, 1954), 217 F. 2d 613, at 616, 619.

It is submitted that Stearns' business practices, instead of being reprehensible, have been conducted upon an unusually high ethical plane. The lease agreement by which machines are leased to prospective customers imposes practically no obligation on the lessee other than the payment of rental and payment for damages beyond ordinary wear and tear. There are absolutely no restrictions, express or implied, against licensees' free purchase or lease of materials or machines from others. There is no evidence that in practice any such restrictions exist. The licenses are distinctive in their absence of most of the restrictions upon the licensee which may be legally imposed. Here again, the only obligations are the payment of royalties. Even plaintiffs' advertising, which is institutional in character, is in keeping with this high ethical level of business practice (Stearns' lease agreement, Ex. E attached to plaintiffs' main brief; Stearns' license agreements, Defs.' Exs. AA and BB attached to plaintiffs' brief; plaintiffs' advertisement, Defs.' Exs. J and K, physical exhibits).

Defendants, in support of their misuse contention, rely on

Motion Picture Patents Co. v. Universal Film Mfg. Co.,
243 U.S. 502, 510, 513; 61 L. Ed. 871, 876, 877;
Mercoird Corp. v. Mid-Continent Investment Co., 320
U.S. 661, 665, 666; 88 L. Ed. 376, 380, 381;
Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488,
493; 86 L. Ed. 363, 366;
Carbice Corp. v. American Patents Development Corp.,
283 U.S. 27; 75 L. Ed. 819;

- Leitch Mfg. Co. v. Barber Co.*, 302 U.S. 458; 82 L. Ed. 371;
Barber Asphalt Corp. v. LaFera Grecco, 116 F. 2d 211 (CA 3);
Dehydrators, Ltd. v. Petrolite Corp., 117 F. 2d 183 (CA 9);
B. B. Chemical Co. v. Ellis, 314 U.S. 495, 498; 86 L. Ed. 367, 370;
Cardox Corp. v. Armstrong Coalbreak Co., 194 F. 2d 376 (CA 7); *cert. den.* 343 U.S. 979; 96 L. Ed. 1371.

These cases do not support the contention that it is misuse to deal only in whole machines when the patent claims enumerates only a portion of the components of the machines. However, this contention of defendants is not a new one and has been turned down in three separate circuits. See *Electric Pipeline, Inc. v. Fluid Systems, Inc.* (CA 2, 1956), 231 F. 2d 370; *Great Lakes Equipment Co. v. Fluid Systems, Inc.* (CA 6, 1954), 217 F. 2d 613 at 616, 619; *Vulcan Mfg. Co. v. Maytag Co.* (CA 8, 1934), 73 F. 2d 136 at 138, 139.

The facts of the cases relied upon by defendants differ materially from those involved in the instant case. For instance, in the *Morton Salt* case, the patent covered a salt-dispensing machine, and it was held a misuse to condition purchases of the machines upon the purchase of unpatented salt tablets.

In the *Mercoid* case, the patent covered a stoker combination. The patentee conditioned the use of the combination upon the purchase of an unpatented control which went into the stoker but was actually separately sold.

In the *Dehydrators* case, the patent covered the method of breaking emulsions by treating them with certain chemi-

cals. Use of the patented method was conditioned upon purchase of the unpatented chemicals.

The other case relied on by defendants are of the same character as the above.

The *Cardox* case is contended by defendants to be factually similar to the case at bar. However, this just is not supported by reference to the decision. The patent covered a cartridge to be charged with compressed air. In order to obtain rights under the patent, it was necessary to contract for one year's use of a "Cardox unit." The "Cardox unit" included five of these cartridges, but then added several truckloads of pipe, couplings, a gas compressor and motor, four blow-down valves, three line valves, and three unions. The patentee contended that this was a "Cardox unit", but the court looked under that artificial grouping and recognized it to be one of the classic examples of tie-in. Here, the Stearns machine is an integrated, compact unit—obviously indivisible in fact. The title of the patent is "Insulation Testing Device", and, indeed, claim 1 recites, "An electric exploring device for detecting defects in an insulating coating on an elongated member which comprises. . . ."

To affirm the lower court in its holding of misuse would be to advance the misuse doctrine in this circuit beyond any previous holding in any court, directly opposite to the rule in the Second, Sixth, and Eighth Circuits. Further, and more importantly, it would render it nearly a physical impossibility for an article to be manufactured and sold as covered by a patent, because, carried to its logical conclusion, even a coat of paint would of necessity have to appear in the patent claim or a sale of a painted patented device would constitute a misuse.

IV. CLAIM 7 IS ENTITLED TO A RANGE OF EQUIVALENTS TO ENCOMPASS DEFENDANTS' DEVICE

File wrapper estoppel is not involved in claim 7. While it is true that the functional statement at the end of claim 7 is not met in its strictest sense by defendants' model C-3 detector in that relative movement is permitted between the wand and carriage thereof, nevertheless this difference disappears in operation, and the structural recitations of the claim are squarely met and the device functions in a manner equivalent to the "whereby" clause at the end of the claim. As a practical matter in operation, the wand and the carriage are a unit which must advance down the pipeline as a unit with a longitudinal motion, which motion is translated to the rolling of the electrode while maintaining the electrical connection. As stated in *Graver Tank Mfg. Co., Inc. v. Linde Air Products Co.*, 339 U.S. 605, 94 L. Ed. 1097, an invention is not to be limited, unless by the prior art, to "outright and forthright duplication. . . . To prohibit no other would place the inventor at the mercy of verbalism and would be subordinating substance to form."

V. PLAINTIFFS' STATEMENT IN ITS BRIEF AS TO WHAT IS CONTENDED TO INFRINGE CLAIMS 1 AND 7 IS CLEAR

At page 7 in its brief, plaintiffs state in effect that they are restricting the contention in this appeal as to what infringes to those devices manufactured and sold by defendants prior to the filing of the complaint and which utilize the pusher and electrode exemplified by plaintiffs' Exhibits 26-A and 26-C. Defendants, in their brief com-

mening at page 24, misconstrue this statement and discuss devices which obviously are not the pusher and electrode of plaintiffs' Exhibits 26-A and 26-C. As to structures manufactured and sold by defendants since the filing of the complaint, it is submitted that they should not be considered until a supplemental complaint or new bill is filed. If plaintiffs are successful on this appeal, then, upon the filing of a supplemental complaint, a Master could appropriately go into the structures of such subsequent models to determine the extent of infringement.

Accordingly, the Court is respectfully requested to sustain plaintiffs' appeal.

Respectfully submitted,

JAMES B. SIMMS

BROWNING, SIMMS & HYER
3303 Montrose Blvd.

Houston 6, Texas

*Attorney for Plaintiffs-
Appellants*

Of Counsel:

H. CALVIN WHITE

611 Wilshire Blvd.

Los Angeles 17, California

Certificate of Service

Three copies of the foregoing PLAINTIFFS-APPELLANTS' REPLY TO BRIEF OF TINKER & RASOR, JOHN P. RASOR AND LEO H. TINKER IN ANSWER TO PLAINTIFFS' OPENING BRIEF have been served upon Defendants-Appellees this _____ day of _____, 1956, by mailing three copies

to Edward B. Gregg, attorney of record for Defendants-Appellees, at 410 Mills Building, San Francisco 4, California, the same being the last address of Edward B. Gregg known to Appellants and Appellants' attorneys, these copies being sent through United States mail, postage prepaid.
